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No. [redacted] 7 4

In the Supreme Court of the United States

OCTOBER TERM, 1928

THE ANN ARBOR RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE CALIFORNIA GROWERS' AND SHIPPERS' PROTECTIVE LEAGUE, APPELLEES.

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 273

THE ANN ARBOR RAILROAD COMPANY, THE ATCHISON, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, et al., appellants

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE Commerce Commission, and the California Growers' and Shippers' Protective League, appellees

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The specially-constituted District Court filed two memorandum opinions (R. 99, 105) which have not been reported.

The reports of the Interstate Commerce Commission appear as Docket No. 19130, *California Grow-*

ers' and Shippers' Protective League v. *Southern Pacific Co. et al.*, 129 I. C. C. 25 (R. 16–65), and 132 I. C. C. 582 (R. 65–69).

THE QUESTION

In the proceeding begun upon complaint of California producers and shippers of deciduous fruits alleging that the transportation rates on those commodities to destinations in the East were unjust and unreasonable and prejudicial, the Interstate Commerce Commission found after full hearing and upon a voluminous record that the rates were unreasonable and issued its order requiring the numerous common carriers engaged in that transportation to make small reductions in the rates and thereafter to establish and charge rates not in excess of those prescribed in the order.

The validity of the order is the ultimate question, a determination of which involves the following subordinate questions: (1) whether the order is supported by substantial evidence; (2) whether the Commission committed error of law in construing the joint resolution of Congress known as the Hoch-Smith Resolution; and (3) whether the rates prescribed are confiscatory.

STATUTES

The pertinent provisions of the Interstate Commerce Act (c. 104, 24 Stat. 379) as amended by Transportation Act, 1920 (c. 91, 41 Stat. 456, 475, 479, 484, 488, 491; U. S. C. Title 49, Sections 1, 3, 15, 15a):

SEC. 1. * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *.

SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of mes-

sages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15a. * * *

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

* * * * *

(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

The so-called Hoch-Smith Resolution (43 Stat. 801, Public Res. No. 46, S. J. Res. 107) approved January 30, 1925, is as follows:

CHAP. 120.—Joint Resolution Directing the Interstate Commerce Commission to take action relative to adjustments in the rate structure of common carriers subject to the Interstate Commerce Act, and the fixing of rates and charges.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes,

adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the commission.

In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceed-

ing resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

STATEMENT

The growing and shipping of deciduous fruits is one of the great basic industries of California. These fruits are grown throughout the State, from the Imperial Valley north to Redding. The soil and climate are peculiarly adapted to fruit and vegetable culture, and there are large areas that can be used for those purposes only. The growing of deciduous fruits is the most important single agricultural interest in the State, as shown by the values of its several farm products in 1925: Deciduous fruits $105,756,000, citrus fruits $85,243,000, vegetables $52,047,000, and main field crops $194,675,000. (R. 216, Ex. 16.)

Not more than 5 per cent of the production of fresh fruits in California is consumed there, and most of the product must of necessity move to the large consuming territory in the East.

The principal deciduous fruits shipped from California are grapes, peaches, pears, plums, apricots, cherries, and apples. Practically all of the cherries are shipped by express and most of the peaches and apricots are utilized by the canneries and dried-packing plants within the State.

The principal originating trunk-lines are the Southern Pacific, the Santa Fe, and the Western Pacific. The Los Angeles & Salt Lake, a part of the Union Pacific system, handles a relatively small amount of the traffic. The traffic moves over these lines and their connections chiefly to the large cities in the territory east of the Mississippi Rver, and north of the Ohio.

The fruit is shipped in refrigerator cars. An extra charge in addition to the line-haul rate is made for refrigeration, averaging about $85 a car. (Ex. 26.) No complaint was made against the assessment of an additional charge for refrigeration, nor against the amount of the refrigeration rate.

The complaint brought in issue the reasonableness of the deciduous fruit rates from California to the territory east of the Rocky Mountains. That territory has been divided by the carriers for the purpose of making transcontinental rates into 12 groups, designated by letters, viz, groups A, B, C, D, E, F, G, H, J, K, L, and M. The territorial limits of these groups are shown in the sketch appended to this brief. The most westerly group is "J," embracing the eastern portions of Colorado and New Mexico. With the exception of Group J, the rates applicable to the California deciduous fruit traffic are "blanketed" over all these groups, with the result that the same rate applies from California to any point east of Group J. To Group J the rate is slightly lower than the blanket rate. This enor-

mous blanket, undoubtedly the largest in the United States, was established voluntarily by the carriers, and they desire that it be continued, as do the shippers. All parties to the proceeding agreed that the blanket should not be broken up. The Commission did not disturb it.

When prices of fruit are high, growers are not particularly concerned about the level of their rates. This was true in 1920 when both rates and prices were at their peak. But when prices are low, transportation charges become an important item of expense in the production and marketing of fruit. That is the present condition of the industry. Since 1922, the industry has suffered because of a marked decline in prices received for the fruit without corresponding reductions in the cost of production, including transportation to markets in the East, and this recession in prices, and consequent economic depression, has continued practically unabated since that date.

Proceedings before the Commission

A. Proceedings in earlier case

Before discussing the proceeding in which the Commission issued the order here assailed it should be stated that three years previously the same rates were before Division 1 of the Commission upon a complaint filed August 31, 1923, by the same complainant invoking the same sections (1 and 3) of the Interstate Commerce Act, but upon a less extensive and exhaustive record. *California Grow-*

ers' and Shippers' Protective League v. *Southern Pacific Co. et al.*, 100 I. C. C. 79 (Docket 15137), decided June 25, 1925. While that case was pending decision, the Hoch-Smith Resolution was enacted January 30, 1925, carrying a provision that cases then pending before the Commission involving rates on agricultural products should be decided in accordance with the resolution. Division 1 said, at page 106 of its report:

> We have given consideration to the matters mentioned in the Resolution—

but, nevertheless, found that the rates were not unreasonable or unduly prejudicial, and dismissed the complaint, with the statement, however, at page 108:

> This finding is without prejudice to any conclusion which may be reached upon the later and more comprehensive record concerning the relation of railroad rates to agriculture which is expected to be developed in Docket No. 17000.

B. Proceedings in present case

The proceeding which resulted in the issuance of the order assailed by appellants, was instituted by complaint (R. 139) filed by the same complainant December 27, 1926, alleging that the rates of $1.62,[1] carload minimum weight 26,000 pounds, to Group J, and $1.73, with the same minimum, to the other

[1] All rates are herein stated in amounts per 100 pounds.

groups, on fresh deciduous fruits, other than apples, were unreasonable, in violation of section 1 of the Interstate Commerce Act, and unduly prejudicial, in violation of section 3 of that Act.

The complaint further alleged that those rates were "higher than the lowest possible lawful rates compatible with the adequate maintenance of transportation service, and upon an unjust and unreasonable basis with relation to other rates, in violation of the * * * Hoch-Smith Resolution."

It was further alleged that a just, reasonable, nonprejudicial and lawful rate for the transportation of deciduous fruits, in carloads, from points in the State of California to points in all of the aforesaid groups should not exceed $1.44, this being the rate that had been in effect immediately following the general increase of 25% effected June 25, 1918. The complaint expressed the willingness of the shippers to agree to an increase in the carload minimum weight on grapes, which constitute about 80 per cent of the deciduous fruit traffic, from 26,000 to 30,000 pounds.

The rate on apples was lower than on other deciduous fruits, being $1.41 to Group J, and $1.50 to the other groups. The complaint did not attack the reasonableness of these rates on apples. The term "deciduous fruits" will be used hereinafter to mean deciduous fruits, other than apples.

It was also alleged, and the evidence shows, that for many years prior to June 25, 1918, the rate maintained for the transportation of deciduous

fruits from California to the above-mentioned groups was $1.15 per 100 pounds; that this rate was increased on June 25, 1918, to $1.44 per 100 pounds; that the latter rate remained in effect until August 26, 1920, when it was increased to $1.80 to Group J, and to $1.92 to the other groups; that the last-named rates remained in effect until January 1, 1922, when they were reduced to $1.62 and $1.73, respectively, and that the latter rates had been maintained continuously since the last-mentioned date, without reduction, notwithstanding that the volume of the deciduous fruit traffic had enormously increased, and notwithstanding that subsequently to January 1, 1922, the defendants had substantially reduced the rates maintained and enforced by them for the transportation of a large number of commodities other than deciduous fruits, with the result that the California fruit growers and shippers were required to pay for the transportation of their traffic rates which were disproportionately high and which furnished an undue and unjust proportion of the revenues of the defendant carriers. (R. 142–145.)

The Railroad Commission of the State of California, the Railroad Commission of the State of Arkansas, the California Fruit Exchange, the California Farm Bureau Federation, the Arkansas Packing Corporation and the Ozark Fruit Growers Association intervened in the proceeding before the Commission in support of the complaint. The De-

partment of Agriculture and Markets of the State of New York, and the Departments of Agriculture of Pennsylvania and Michigan intervened in opposition to the complaint.

After full hearing, briefs were filed and the case was orally argued to the entire Commission. July 20, 1927, the Commission (not a division thereof) issued its report and order, *California Growers' & Shippers' Protective League* v. *Southern Pacific Co. et al,* 129 I. C. C. 25.

The evidence adduced at the hearing, as will be demonstrated hereinafter, was exhaustive in detail and included within its scope almost every conceivable type of information pertinent to a determination of the issues. The mass of facts contained in the record is stated in condensed form in the Commission's report (R. 16–65), and upon these facts the order (R. 6–7) is based.

The Commission did not sustain the allegation of undue prejudice, but found that the rate of $1.73 to Groups A to M, inclusive, except Group J, and the rate of $1.62 to points in Group J were unreasonable to the extent they exceeded $1.60 and $1.50, respectively, which rates the order required appellants to establish, with permission to increase the carload minimum weight on grapes from 26,000 to 30,000 pounds. The prescribed rates became effective February 10, 1928, after the court below denied the motion for an interlocutory injunction, and are now in force.

September 8, 1927, the defendant carriers petitioned the Commission for reconsideration upon the record as made. November 14, 1927, the Commission issued its report on further consideration, 132 I. C. C. 582, adhering to its former findings and affirming its order of July 20, 1927, except as modified by its order of October 14, 1927, which relieved the carriers of the necessity of establishing the prescribed rates over routes via north Pacific Coast gateways.

Proceedings in Court below

November 22, 1927, the appellants filed their petition to enjoin the Commission's order. December 20 and 21, 1927, oral argument was had before the specially-constituted District Court (Circuit Judge Rudkin of the Ninth Circuit, and District Judges St. Sure and Kerrigan), upon motion for a temporary stay and interlocutory injunction. January 18, 1928, the District Court rendered its memorandum opinion, denying the motion. (R. 99.) May 1, 1928, final hearing was held. May 3, 1928, the court rendered its memorandum opinion upon final hearing. (R. 105.) May 9, 1928, final decree was entered, dismissing the bill for want of equity. (R. 107.)

Prior proceedings in this Court

May 11, 1928, appellants filed a "Motion for Stay or Suspension of Operation of Order of Interstate Commerce Commission pending Appeal." May 21,

1928, this court heard oral argument upon the motion and on May 28, 1928, denied it.

SUMMARY OF ARGUMENT

I. The Commission having found that the assailed rates were unreasonable, upon a comprehensive record containing exhaustive evidence concerning almost every conceivable factor of rate making, there is no foundation for appellants' assertion that the order has reduced a reasonable rate. The finding in this case that the rates were unreasonable is fully supported by substantial evidence:

1. Deciduous fruit rates, like all other rates, were subjected to the several nation-wide horizontal increases, and while rates on the great body of transcontinental traffic have since been reduced to about 25 per cent above their pre-war level, the deciduous fruit rates remained 50.4 per cent above that level.

2. The deciduous fruit rates were higher than transcontinental rates generally on other fruits and vegetables from California.

3. Greater revenue was produced by the assailed rates than by rates on other comparable traffic for similar hauls in other sections of the country.

4. Deciduous fruit moves in tremendous volume from California, the yearly tonnage now approximating five times the pre-war tonnage.

5. The market prices of deciduous fruits were deflated to the extent that they were less than 57 per cent of their "peak" in 1920, the 1926 prices

being only 3.5 per cent higher than those of 1917, while the freight rates had been reduced only 10 per cent below their peak, and were 50.4 per cent above their 1917 level.

II. The Hoch-Smith Resolution was correctly construed by the Commission as setting no standard of lawfulness of rates, new or different from that already provided by the Interstate Commerce Act. It properly interpreted the Resolution to mean that, to the extent that there are flexible limits to the Commission's discretion in determining the lawfulness of rates, it should require, on products of agriculture affected by depression, the establishment of the lowest rates falling within those flexible limits, compatible with the maintenance of adequate transportation service. It is an established principle of rate-making that the burden of transportation may reasonably be adjusted with some regard to the value of the service, and the higher grade, more valuable commodities be required to yield a greater margin of profit than those of lower grade and less value. Thus, the Commission did not construe the Resolution as authorizing it to reduce a rate which it was without authority under the Act to reduce. The correctness of this interpretation is fully sustained by the legislative history of the Resolution.

1. Appellants' contention that the Commission's interpretation of the Resolution impliedly repeals Section 15a of the Act must fall, because (1) the Commission did not reduce a "reasonable" rate,

but a rate which it found, upon substantial evidence, to be unreasonable, (2) there is no proof that the reduction required by the order will substantially reduce appellants' revenues; and (3) reducing an unreasonable rate, with or without a direction from Congress, does not to any extent repeal Section 15a, for that section itself expressly reserves to the Commission the power to reduce unreasonable rates.

2. The effect upon appellants' revenues of the reduction required by the order will be inconsequential.

3. Appellants' assertion that the Commission construed the Resolution as authorizing it to fix a rate yielding revenue only slightly above operating expenses is based on misunderstanding of the language used by the Commission.

4. That the Commission exercised its statutory power only to regulate rates and not the fruit industry is shown by the report itself. In so far as "commercial conditions" involve value of the commodity and value of the transportation service to the shipper, they properly may be considered with numerous other factors in determining the reasonableness of rates.

III. The evidence shows that the prescribed rates are not confiscatory, and appellants have not demonstrated the contrary. They admit their cost study is inaccurate and defective in certain respects. Moreover, it is based on only one of the several varieties of fruit, covers shipments moving in 1923, without showing that costs for 1926 were the same,

whereas, operating costs of the Santa Fe—the only carrier included in the cost study—are shown to have been lower in 1926 than in 1923. The study does not purport to show that costs on even one of the other 449 carriers were the same as those of the Santa Fe.

ARGUMENT

I

THE COMMISSION FOUND UPON THE RECORD BEFORE IT THAT THE RATES WERE UNREASONABLE; THAT FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The crux of appellants' argument is predicated upon the assumption that the rates reduced by the Commission were reasonable rates. Having thus assumed its major premise, the argument proceeds upon the theory that the Commission, misinterpreting the Hoch-Smith Resolution, erroneously applied it by reducing these reasonable rates without substantial evidence to support its action. We are thus confronted at the outset with the question whether the Commission's finding of unreasonableness is supported by substantial evidence. We will refer briefly to the evidence, therefore, before entering upon a discussion of the Resolution, to demonstrate that it was of the most substantial character and amply supported the Commission's finding that the challenged rates were unreasonable.

1. *Rates on California deciduous fruits remained practically at their war-time peak while the rates on the great body of transcontinental traffic were reduced.*—The rates on deciduous

fruits, like all other rates in the United States, were subjected to drastic increases as a result of war-time conditions. The first nation-wide increase was made June 25, 1918, while the railroads were under Federal control. This was a flat, horizontal increase in all rates generally of 25%. Further nation-wide increases were made shortly after the railroads were returned to private control, and were authorized by the Commission in *Increased Rates, 1920,* 58 I. C. C. 220, in pursuance of the provisions of the Transportation Act 1920 which added section 15a to the Interstate Commerce Act. These increases were flat, horizontal increases of 40% in the eastern district, 25% in the southern district, 35% in the western district, 25% in the mountain-Pacific district, and 33⅓% in the rates applying interterritorially, that is, from one district to another.

The pre-war rate on deciduous fruit from California to the East was $1.15. (R. 229–230, Ex. 28.) This rate, established voluntarily by the carriers in 1911, remained in effect until June 25, 1918, when, as a result of the 25% increase, it became $1.44. On August 26, 1920, it was subjected to the horizontal increase of 33⅓% and became $1.92 [2]—its "war-time peak."

July 1, 1922, a nation-wide reduction of 10% in practically all rates was made as a result of the ac-

[2] This was the rate to all groups other than "J," which is here neglected because of the small volume of traffic to that group.

tion of the Commission in *Reduced Rates 1922*, 68 I. C. C. 676. The California deciduous fruit rate was accordingly reduced from $1.92 to $1.73. This reduced rate was first established temporarily by the voluntary action of the carriers on January 1, 1922, and after July 1, 1922, was continued without time limit.

No further reduction was granted by the carriers in this rate and it was still in force at the time the complaint was filed with the Commission on December 27, 1926. So that it was then but 10% less than the war-time peak and was 50.4% higher than the pre-war rate of $1.15.

Meanwhile the rates on the great body of transcontinental traffic had been reduced from the war-time peak. Beginning about January 1, 1922, there had taken place a gradual downward readjustment of the transcontinental rate structure. The rates on deciduous fruit did not share in this downward readjustment and as a result deciduous fruit rates were upon a higher level above the pre-war basis at the time the complaint was filed than were the rates upon the great body of transcontinental traffic. Proof of this was submitted by showing that upon 75 commodities moving eastbound and upon 65 commodities moving westbound, admitted by the carriers to represent a fair cross-section of the transcontinental traffic, the rates averaged 29% and 22% above the pre-war level. Import and export rates from and to Pacific coast ports exceeded the pre-war basis on

an average of 41% and 18%, respectively. The rates on lumber from the Pacific coast moving transcontinentally exceeded the pre-war basis but 23%, and those on petroleum and its products but 25%. Fresh citrus fruits were only 35% higher. In *Express Rates 1922*, 83 I. C. C. 606, and 89 I. C. C. 297, the Commission found the carload express rates then in effect on fruits, berries, vegetables, butter and eggs to be unreasonable and ordered them reduced. As a result of that order, the carload express rate on fruits and vegetables from the Pacific coast to New York and other points east of Chicago was only 27.6% above the pre-war level. If the deciduous fruit rates here involved had been reduced to reflect the same percentage over the pre-war basis, the $1.73 rate would have become $1.465. The Commission prescribed $1.60. To recapitulate, these rate levels are set out in tabular form:

Percentage above pre-war basis[1]

Deciduous fruits	50.4
Fair cross section of transcontinental traffic:	
Eastbound (75 commodities)	29
Westbound (65 commodities)	22
Import rates from Pacific coast ports	41
Export rates to Pacific coast ports	18
Lumber	23
Petroleum and its products	25
Fresh citrus fruits	35
Express rates on fruits and vegetables	27.6

Thus, while all rates went up together and all reached their war-time peak, practically all have

[1] Meaning the basis in effect immediately prior to the general 25% increase of June 25, 1918.

since come down materially except the deciduous fruit rates, with the result that a disproportionate share of the transcontinental freight-rate burden was cast upon deciduous fruits. Complainants sought the same benefits for deciduous fruits that the carriers, in the exercise of their rate-making discretion, had granted to other transcontinental traffic quite generally.

2. *The rates on deciduous fruits were higher than the rates generally prevailing on other fruits and vegetables moving transcontinentally from California.*—A comparison of the deciduous-fruit rates in issue with the rates on the other principal fruits and vegetables that move from California to the East showed that generally speaking the rates on the deciduous fruits were the highest. For instance, the $1.73 rate on deciduous fruits to the eastern groups was 18 cents per 100 pounds higher than the rate on oranges to the same destination groups and 23 cents per 100 pounds higher than the rates on lemons and apples to the same groups. (Ex. 29.)

The deciduous-fruit rates in issue were also generally higher on the average than the transcontinental rates on melons, cantaloupes and vegetables. The differences are shown in the following tabulation:

	From California points to groups					
	A	B	C	D-E	F-G-H	J
Melons Cantaloupes Vegetables (in package) Deciduous fruits	175 173	173 173	165 173	146 173	139 173	134 162

There was an even greater disparity as between the rates on deciduous fruits and those on vegetables in bags and fresh cabbage in crates. The deciduous fruit rates exceeded these latter rates in the following amounts:

	Cents
To Groups A, K, L, and M	22
To Group B	37.5
To Group C	45
To Groups D and E	63
To Groups F, G, and H	63
To Group J	56

There were also comparisons as between deciduous fruits and other fruits and vegetables in respect of the revenue on the per car, per car-mile, per net ton-mile, and per gross ton-mile bases, calculated upon the average weighted haul. These comparisons are set out in tabular form in the Commission's report (R. 31) and need not be reproduced here. As stated in the report, the earnings per car on deciduous fruits were higher than on lemons and were materially higher than on fresh vegetables and cantaloupes. They were lower than on apples and citrus fruits, but considering the length of the haul, the net ton-mile earnings on deciduous fruits were relatively higher than on all the other commodities,

while the car-mile and gross ton-mile earnings were higher in some instances and lower in others.

3. *The rates on deciduous fruits from California yielded greater revenue than the rates on other comparative traffic for similar hauls in other sections of the United States.*—Comparisons of the deciduous fruit rates in issue with the rate on bananas and cocoanuts from New Orleans and other Gulf ports to Portland, Oreg., Spokane and Seattle, Wash., Vancouver, B. C., and Los Angeles and San Francisco, Calif., an average distance of 2,964.8 miles, which is about the same as the weighted average haul of California's deciduous fruits in 1926 (2,970 miles), showed that while the rate on the latter commodities was somewhat higher, the per car revenue was substantially lower, being $360.02 per car as against $489.42 per car on deciduous fruits. The average number of cars in a special train of bananas is about 41; in a typical train of deciduous fruits 55. It was shown that the gross revenue yielded by a typical trainload of bananas from New Orleans to Pacific coast destinations was $15,000, whereas that on a typical trainload of California deciduous fruits yielded an approximate gross revenue of $29,000.

A summary of 171 rates on bananas from New Orleans and other Gulf ports to destinations in eastern trunk-line, central freight association, western trunk-line and transcontinental territories, applying for an average distance of 2,525 miles,

showed that the average earnings per car and per gross ton-mile were lower than the average under the deciduous fruit rates assailed.

Similar comparisons showed that the rates on pineapples from Gulf ports to Pacific coast points, an average distance of 2,938 miles, yielded average earnings, after deducting terminal expenses absorbed by the carriers, of $461.40 per car, as against $489.42 yielded by the deciduous fruit rates in issue.

4. *The deciduous-fruit traffic moves in tremendous volume.*—As stated in the Commission's report, "Volume of movement is an important factor in testing the reasonableness of a rate." In 1926, the movement to groups A to M except J amounted to 1,044,969 tons. This vast tonnage moved in 74,456 cars made up as follows: Grapes, 58,334; pears, 9,523; plums, 4,741; peaches, 1,093; and miscellaneous, 765. The movement to group J amounted in 1926 to 8,768 tons, or 627 cars.

In 1916 the total carload shipments of deciduous fruits from California to interstate destinations amounted to 17,891 cars. In 1925 the shipments approximated nearly five times that number, 86,795 cars. During the last three years covered by the record, 1925–1927, the average was 85,144 cars. (R. 223,104.) The movement of deciduous fruits begins in June and continues in substantial quantities until December. From June 15 to November 20, 1926, there were only nine days upon which less than 100 cars of deciduous fruit originated on the

Southern Pacific and the Western Pacific for eastbound movement. While in many instances, reconsignments necessitate taking some of the cars out of the train enroute, nevertheless many of the trains go through solid. This is a factor which has a decided bearing upon the reasonableness of the rates, for, as stated by the Commission in the *Cattle Raisers Case,* 11 I. C. C. 296, 335:

> No one thing so contributes to reducing the cost of movement as the ability to handle traffic long distances in solid trains.

5. *Fruit prices have been deflated while freight rates on fruit have remained inflated.*—While deciduous fruit prices were generally inflated during and following the period of the World War, freight rates likewise reached their peak at about the same time. Freight rates on deciduous fruits did not change in the face of changed conditions in the deciduous-fruit industry. The challenged rates on deciduous fruits were but 10% less than the wartime peak, while the price levels of all deciduous fruits had been deflated to a point where the weighted average prices in 1926 were less than 57% of the peak prices received in 1920. For example, the average price in 1917 of apricots, grapes, peaches, pears, and plums was $5.43 per 100 pounds; in 1920, it was $9.97 per 100 pounds; 1926, $5.62 per 100 pounds. *Compared with 1917 prices, those in 1926 were but 3.5% higher, while the freight rates were still 50.4% above the 1917 level.* (Exs. 24 and 25; R. 226, 228.)

In 1920, transportation and refrigeration charges constituted 18.8 per cent of the price received for the fruits in eastern markets; in 1925 this percentage had grown to 35. (Exs. 26 and 27, R. 228.)

It is impossible without unduly extending this brief to refer in detail to all the evidence submitted to the Commission. The report of the Commission, 129 I. C. C. 25–62 (R. 16–65), indicates the nature and extent of the evidence. Appellants make no contention whatever that any of the facts stated in the report are without support of evidence. Reference to it will quickly show that the evidence was quite comprehensive. To summarize, the evidence covered, among other things, the following matters: The volume of traffic; the routes over which the traffic is handled; the manner of assembling the shipments; the length of the hauls and the weighted average haul; the season of movement; the various rate groups; the economic conditions in the California fruit industry and of agriculture generally; the prices realized from the sale of the fruit; comparisons of the deciduous fruit rates in issue with the rates upon other perishable traffic in effect throughout the United States; comparison of the level of deciduous fruit rates with the level of the rates upon other fruits and vegetables that moved from California to eastern territories; comparison of the general level of the deciduous fruit rates with the level of the transcontinental rates generally; the earnings per car-mile, per net ton-mile,

and per gross ton-mile; the extent of the car loading and the average load; traffic and transportation conditions surrounding the movement of deciduous fruits and other commodities; the weather conditions during the time when the deciduous fruit movement occurs and other circumstances and conditions affecting the economy or efficiency of operation; the operating difficulties; the time schedules maintained for the transportation of the fruit; the type of equipment used; the empty return movement; the extent of the loss and damage claim payments; the nature of the terminal service accorded to the traffic; diversions and reconsignments; the question of the freedom of the movement; the effect of the proposed reduction upon the industry and upon the carriers; the operating returns of the carriers handling the traffic, their income and financial condition in general; the cost of the transportation service, and many other matters.

A very full and complete record was developed which disclosed with unusual thoroughness the facts and circumstances which a rate-making body would need to consider in fixing rates upon the traffic, including virtually all conceivable elements of rate making.

It is believed that the evidence establishing the five facts referred to above alone is sufficient to support the Commission's order. That the evidence did establish these facts is not denied. That led to the conclusion that the rates attacked were

unreasonable, and, when considered in connection with all the other evidence, seem abundantly to support the Commission's finding of unreasonableness, and to fully support its order prescribing but slightly reduced rates which, in the opinion of the Commission, are reasonable rates.

II

THE COMMISSION CORRECTLY CONSTRUED THE HOCH-SMITH RESOLUTION

The Hoch-Smith Resolution is a joint resolution passed by the Senate and the House, and approved by the President January 30, 1925. It is a consolidation of two resolutions, H. J. Res. 141, introduced by Congressman Homer Hoch, of Kansas (member of the Committee on Interstate and Foreign Commerce), and S. J. Res. 107, introduced by Senator Ellison D. Smith, of South Carolina (then Chairman of the Committee on Interstate Commerce). It is quoted in full at pp. 6–8, *ante*, and is hereinafter called the Resolution.

Having been passed by both houses of Congress and signed by the President, the Resolution has the force of statute law, *Levey* v. *Stockslager*, 129 U. S. 470; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 184; *United States* v. *Chavez*, 228 U. S. 525; *Talbott* v. *United States*, 208 Fed. 144; *Wells* v. *United States*, 257 Fed. 605.

The Resolution is in three paragraphs, the first of which declares it to be the true policy in rate-making to be pursued by the Commission in adjust-

ing freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

The second paragraph directs the Commission to make a nation-wide investigation of all rates and to correct defects. This the Commission is doing. *Rate Structure Investigation,* Docket No. 17000. (Its order instituting this investigation is in the record, pp. 514-522.)

The third paragraph, which is more particularly involved here, provides that,

> In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay, such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

The Commission's interpretation of this third paragraph, as explained in its report (R. 26-28), is in substance as follows:

The Resolution sets no new standard of lawfulness of rates, but provides, in effect, that to the extent that there are flexible limits to the Commission's discretion, the Commission shall require the maintenance of the lowest rates on products of agriculture falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. But it has always been recognized that the burden of transportation may reasonably be adjusted with some regard to the value of the service; in other words, that the higher grade, more valuable commodities may be required to pay a greater margin of profit than those that are of lower grade and less value. The substance of the provision of the Resolution is that agricultural products affected by depression shall in this respect be included in the class of most favored commodities, to such extent as may be "compatible with the maintenance of adequate transportation service." Other sections of the Interstate Commerce Act must be borne in mind in determining the lowest lawful rates in a particular situation. The Resolution is in effect a direction to the Commission to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the Interstate Commerce Act and the carrier's rights under the Constitution. Section 1 of the Act requires that all rates shall be just and reasonable. What is a reasonable rate?

It may be said to be somewhere between the minimum charge that can be made for the service and permit the carrier to live, and the maximum charge that can be borne by the shipper. The legislature or its administrative agent may not make rates so as to confiscate the carrier's property. The carrier on the other hand may not make rates which are unjust to those who by economical necessity are compelled to employ its service. Here, then, is the minimum of legislative power and the maximum of the carrier's power. Between these limits lies a zone, indefinite and varying, a "zone of reasonableness," within which any rate is just and reasonable to the carrier, as well as just, fair, and reasonable to the shipper that utilizes the carrier's services. The Commission concludes that "the lowest possible lawful rates" which it may prescribe under the Resolution on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in the Commission, and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service.

The Resolution itself, by the use of the words "*lowest* possible lawful rates," recognizes that there may be more than one lawful rate, that there is a "zone of reasonableness," and that there are flexible limits to the Commission's discretion in the prescription of rates for future application.

Room for the exercise of these flexible limits of discretion grows out of the fact that there is no way by which it may be determined with mathematical accuracy just how much a particular rate should be. As expressed in *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 550, "there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer."

The Act requires that all rates shall be just and reasonable and reposes authority in the Commission to determine and prescribe rates which meet that standard. (Sec. 1 (5); Sec. 15 (1).) But since it is impossible to determine with accuracy what rates are just and reasonable, that question is left to the judgment and discretion of the Commission. Its judgment is to be formed from the evidence; and its conclusion is accepted as final when its action is not arbitrary or otherwise unlawful. To quote again from the *Union Pacific* case:

> With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. [Here the Court uses the language above quoted.] Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive.

In other cases this Court has recognized the zone of reasonableness and the wide range of discretion in the exercise of the power to prescribe reasonable rates. *Illinois Central R. R.* v. *United States,* 263 U. S. 515, 524; *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 598–599; *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605, 608.

The Resolution calls for the exercise of the Commission's discretion in a particular manner; that is that the Commission shall make rates upon products of agriculture affected by depression at the lowest rates which are lawfully possible, subject to the reservation that the rate shall not be fixed so as to interfere with the maintenance of an adequate transportation service.

That the Commission has properly construed the Resolution is shown by the committee reports and by statements of the authors of the bills made during the debate, reference to which is permissible to clear up any ambiguity that may exist.

The report of the Committee on Interstate Commerce (Senate Rep. 313, 65 Cong. Rec., Pt. 5, p. 5120) stated the purpose of the Resolution to be of declaring the policy of the Congress as to freight rates on agricultural products and directing the Interstate Commerce Commission to carry this policy into effect. The report stated:

> Congress having delegated to the Interstate Commerce Commission the power to make rates, it was thought unwise to attempt

to dictate any specific rate, but to direct the commission that in the exercise of its rate-making power that the products of agriculture should carry the lowest rate in the rate structure. This is because the products of agriculture are the prime essentials in the economic structure of organized society. These products are produced under circumstances that do not permit the producer to pass the charges incident to their marketing to the consumer.

The agriculturist pays the freight upon what he buys and sells. It seems, therefore, but just that provision should be made to make his burden as light as possible, especially upon the things he produces.

The report of the Committee on Interstate and Foreign Commerce (House Report 735, 65 Cong. Rec., Pt. 8, p. 8497, May 13, 1924), stated that the Resolution "is based upon the proposition that the present freight structure is out of adjustment, and that certain commodities, particularly agricultural products, are in general, bearing an unfair proportion of the freight burden."

The House Committee was convinced that the flat, horizontal increases in freight rates which had taken place in recent years had disrupted rate relationships, brought about maladjustments and had placed a disproportionate burden upon the products of agriculture, as shown by the following three paragraphs quoted from the report:

The present freight structure, which has grown up piecemeal and is a result of all

sorts of local considerations, has long been out of adjustment. This maladjustment has been greatly increased by the flat horizontal percentage increases in freight rates which have been made in recent years. These flat, horizontal increases were not scientific. The method used was grounded on expediency and the need for prompt action.

During Federal control, on June 25, 1918, there was a flat increase of 25 per cent throughout the whole country. On August 26, 1920, there were further flat, horizontal increases throughout the whole country as follows: 40 per cent in the eastern district, 35 per cent in the western district and 25 per cent in the southern and mountain-pacific districts, with an increase of 33⅓ per cent on interterritorial rates; that is, from one of these groups to another. Since these flat increases went into effect there have been some decreases and various adjustments, and in several districts of the country the commission has been carrying on rather comprehensive surveys of the freight structure.

This improper distribution of the freight burden has borne particularly heavily on the products of the farm owing to the price deflation in those products. The present structure does not give proper weight to the question of what the traffic can fairly bear. The cost of the service to the carriers is not the only factor that must be considered but the value of the service to the shipper as well.

This report quoted from the recommendations of the Joint Congressional Commission on Agricul-

tural Inquiry, which had made an extensive inquiry into the whole problem, as follows:

> The transportation rates on many commodities, more especially the products of agriculture, bear a disproportionate relation to the prices of such commodities; there should be immediate reductions in transportation rates applied to farm products and other basic commodities; greater consideration should be given in the future by public rate-making authorities and by the railroads in making of transportation rates, to the relative value of commodities and existing and prospective economic conditions. The pyramided per cent advances in rates which have been authorized by the Interstate Commerce Commission or made by the United States Railroad Administration caused the dislocation of long-standing relationships between rates upon agricultural and industrial products, between competitive enterprises and competitive sections of the country.

During the course of the debate in the House, Representative Hoch, who submitted the Committee Report, after having called attention to the various horizontal increases in rates which had taken place during the period from 1918 to 1920, stated:

> A moment's thought will show to anyone that flat, horizontal increases of that sort in the freight structure tend to throw the relative rates into dislocation. To make a specific illustration—and I have not time, of course, to give figures—the freight upon a

bushel of wheat is a very large item, but the freight upon a highly fabricated article, as, for instance, a pair of shoes, is comparatively small.

When you increase by 15 to 25 or 35 or 40 per cent the whole freight structure, you see that you do something to the bulky commodities which you do not, in like effect at all, do to other articles. The effect of every one of these flat horizontal increases has been to throw into freight-rate structure of the country new disparities and to greatly accentuate the maladjustments which existed prior to that time. It is conceded that these flat horizontal increases were not scientific. If justified at all the method must be justified on the grounds of expediency and the necessity for quick action. * * *

It is generally agreed, I think, among students of the subject that the rates upon basic commodities should be adjusted and more favorable rates given. * * *

* * * It does not direct particular rates upon farm products, although I am firmly convinced that a study will show that those rates in many cases ought to be reduced, but it does call the attention of the Interstate Commerce Commission by the Congress, which has the right to speak to the commission, which is an agency of the Congress, to the great agricultural depression existing in the country and it says to the Interstate Commerce Commission, "We direct that you shall with the least practicable

> delay make such changes in the freight rates upon farm products, including livestock, as will as far as possible correct any injustices that may be found to exist and promote the freedom of movement of these products." (Cong. Rec., Vol. 65, Pt. 11, page 11019.)[2]

The legislative history of the Resolution shows that the following considerations lead to its passage:

1. Agriculture is the basic industry of the country.

2. The present freight rate structure, which has grown up piecemeal and is the result largely of local considerations, has long been out of adjustment.

3. This maladjustment has been greatly accentuated by the flat horizontal percentage increases in freight rates which have been made in recent years. These increases were not scientific; the method used was grounded on expediency and the need for prompt action.

4. These flat, horizontal percentage increases placed a disproportionate burden upon the products of agriculture as compared with less bulky,

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[2] The following references, aside from the two Committee reports above mentioned, cover the complete legislative history of the Resolution: House Report 867, 68th Cong., 1st Sess., May 27, 1924; House Report 1023, 68th Cong., 1st Sess., June 7, 1924; printed report of "Hearings before the Committee on Interstate and Foreign Commerce, * * * 68th Cong., 1st Sess., on H. J. Res. 141," Apr. 3, 4, 5, and 9, 1924; Vol. 65, Cong. Rec., pp. 346, 1071, 4780, 5120, 8336, 8337, 8456, 8497, 9675, 11018–11026, 11124, 11220, 11246; Vol. 66 Cong. Rec., p. 2501.

higher grade, more valuable commodities, and this burden has become heavier as a result of the post-war price deflation in the products of the farm.

Appellants argue that the Commission erroneously interpreted the Resolution as requiring it "to reduce an existing rate on agricultural products, notwithstanding that the existing rate was reasonable, and otherwise lawful," and that therefore the order is invalid.

The argument, on its face, is obviously unsound, because it takes for granted that the rate challenged by the complaint as unreasonable was reasonable, whereas the reasonableness of the rate was the question at issue in the proceedings before the Commission, and the Commission, after a full hearing, and upon a full record, which disclosed all the relevant transportation facts, found the rate to be unreasonable. Inasmuch as the law sets no standard of reasonableness, and the Commission has exclusive initial jurisdiction to determine the reasonableness of interstate rates, *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, we are unable to understand how it can be consistently said that any rate is reasonable in the absence of a finding to that effect by the Commission.

Appellants' argument would have force only if the Commission had found the assailed rates to be *reasonable* and then, despite that finding, ordered them reduced. But the Commission found, upon the evidence, that the assailed rates were unreason-

able. There was allegation and proof, as well as the finding, that they were unreasonable.

But it is contended that "the finding that the old rate was 'unreasonable' was not a finding that the old rate was unreasonable, measured by the standards of the Interstate Commerce Act, but only that it was in excess of the 'lowest possible lawful rate' enjoined by the Resolution." (Appellants' brief, p. 41.)

The answer to this contention is that the Commission has consistently construed the Resolution as setting up no new standard of reasonableness or lawfulness but that in applying the Resolution the standard of reasonableness to be followed is that provided by section 1 of the Interstate Commerce Act which requires that all rates shall be just and reasonable. In *Grain and Grain Products,* 122 I. C. C. 235, 264, the Commission, referring to the Resolution, said:

> *It sets no new standard of lawfulness,* but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall prescribe the maintenance of the lowest rates falling within those flexible limits. (*Italics ours.*)

In *American Livestock Asso.* v. *A. T. & S. F.,* 122 I. C. C. 609, 617, the Commission repeated that assertion, in almost identical language:

> *It set no new standard of lawfulness,* but said, in effect, that to the extent that there are flexible limits to our discretion we should

> fix the lowest rates falling within those limits. (*Italics ours.*)

In its report in the case at bar the Commission cited the two cases just referred to and adhered to that construction of the Resolution, making it clear that in cases in which the Resolution is invoked the standard of reasonableness is that provided by the Interstate Commerce Act. This is manifested by its language on page 33 of the report, reading:

> The resolution is in effect a direction to us to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the Interstate Commerce Act and the carriers' rights under the constitution. Section 1 of the Act requires that all rates shall be just and reasonable.

It follows that the finding of the Commission, that the challenged rates were "unreasonable," was a finding of unreasonableness under section 1 of the Interstate Commerce Act and not a finding of unreasonableness under a new or different standard. There is no basis for the assertion that the Commission applied any different standard of reasonableness than the lawful one.

Appellants point to the following quoted passage from the Commission's report as showing that the Commission interpreted the Resolution as authorizing it to reduce a rate, though reasonable, if the rate were not the lowest possible lawful rate:

> The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us.

It seems to us this is merely another way of saying that the question at issue was whether the rate assailed was unreasonable; that is, whether it was too high. That this was the question for determination is indicated by the following quoted passage from the report which immediately follows the language quoted above:

> * * * The present $1.73 rate is the outgrowth of the pre-war rate of $1.15, the history of which has been shown. It is now 50.4 per cent higher than the pre-war rate, and it is also considerably higher relatively to the pre-war level than the great body of transcontinental rates. During the period the $1.15 rate was in effect the average annual movement of deciduous fruits transcontinentally was about 16,380 cars, as compared with 86,795 cars in 1925, and 78,803 in 1926. Concurrently with the increase in the eastbound loaded movement there has resulted a greater empty westbound movement. Excluding abnormal years the average load has changed but little in the past 10 years, except on grapes. As to these, complainant now tenders an increase in the present minimum from 26,000 to 30,000 pounds. The other deciduous fruits will not load much above the existing 26,000-pound minimum, and it would

be impracticable to increase the minimum as to them. (R. 57.)

And reference to the report as a whole will show that the question which the Commission considered was whether the rate assailed was too high, i. e., unreasonable. In addition to the passages above quoted, attention is called to the following:

> Rate of $1.73 per 100 pounds on fresh deciduous fruits, other than apples, in carloads, from California to destinations in transcontinental Groups A to M, inclusive (except Group J), found unreasonable to the extent that it exceeds $1.60. Rate of $1.62 on the same commodities from California to Group J points found unreasonable to the extent that it exceeds $1.50. (Syllabus.) R. 16.)
>
> * * * the propriety of $1.73 rate must be considered from the standpoint of its reasonableness for the average weighted haul. (R. 29.)
>
> In connection with this showing of relative rate levels, complainant refers to our decision in *Rates on Grain and Grain Products and Hay,* 64 I. C. C. 85, where we held that grain, grain products, and hay were bearing "a share of transportation charges which is disproportionate." It deduces from this decision the principle that when rates on a particular body of traffic are found to be disproportionately high in comparison with rates on other traffic, it is within our power to condemn such rates as violative of the inter-

state commerce act, and contends that deciduous fruits now bear a disproportionate share of the transcontinental freight-rate burden. They seek the same benefits for deciduous fruits that the carriers, in the exercise of their rate-making discretion, have granted to other transcontinental traffic quite generally. (R. 37.)

Complainant also relies upon the traffic and transportation conditions surrounding the movement of deciduous fruits, and urges that the rates and earnings heretofore shown must be considered in connection with these conditions. There has been an enormous increase in the tonnage of these fruits, and volume of movement is an important factor in testing the reasonableness of a rate. (R. 38.)

We are of the opinion and find upon a consideration of the whole record that the rate of $1.73 as applied to the transcontinental shipment of deciduous fruits from California to Groups A to M inclusive, except Group J, is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; and that the rate of $1.62 currently applicable to Group J points is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.50 * * * (R. 59.)

That the Commission has interpreted the Resolution as authorizing it to reduce rates only when, upon the evidence, it is shown that the rates are unreasonable, is demonstrated by its action in the

case at bar, and also in the earlier case brought by the California shippers, 100 I. C. C. 79, seeking a reduction in the same rates, in which case the Commission, Division 1, found, upon the evidence, that the rates were not unreasonable, and dismissed the complaint, despite the fact that the Resolution was in effect at the time of its decision and despite the fact that, as stated in the report, the Resolution provides that cases pending before the Commission at the time of its passage involving rates on products of agriculture should be decided in accordance therewith. (R. 315.) In other cases brought since the passage of the Resolution, in which the Resolution has been invoked, the Commission has declined to grant relief because it found, upon the evidence, that the rates attacked were not unreasonable. For instance, in *Aberdeen Commercial Club* v. *Camas Prairie R. R. Co. et al.*, 126 I. C. C. 498, in which the rates on coarse grain from South Dakota to points in Montana, Idaho, Washington, and Oregon were attacked as unreasonable (report, p. 498), and in which the Hoch-Smith Resolution was invoked (report, p. 501), the Commission found that the rates assailed were not unreasonable and dismissed the complaint. Similar cases are: *Milk and Cream between New England Points,* 126 I. C. C. 38, 68–69; *Unmanufactured Tobacco from Kentucky,* 126 I. C. C. 93, 95; *Minnesota-Dakota Transit Millers* v. *A. A. R. R. Co. et al.,* 118 I. C. C. 585, 596–597; *Cream and Related Articles,* 115 I. C. C. 447, 450; *American*

Livestock Asso. v. *A., T. & S. F. Ry. Co. et al.*, 122 I. C. C. 609, 617–618.

The sole foundation for the assertion that the rates assailed were reasonable is that, upon the evidence of record in the earlier proceeding in 1923, Division 1 of the Commission found these rates to be not unreasonable. (100 I. C. C. 79.) The Division reached that conclusion upon the evidence before it in that case, as its duty compelled. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91. Nor can that finding be construed as an affirmative holding that the rates were reasonable. Even so, it does not follow that those rates would be reasonable three years thereafter. *National Hay Association* v. *M. C. R. R.*, 19 I. C. C. 34, 37. Moreover, the Act (Secs. 16a and 17 (4)) provides for reconsideration by the Commission of its decisions, clearly contemplating even a reversal of its findings upon the same evidence. In that event the first report is deemed to have been withdrawn. *New England Divisions Case*, 261 U. S. 184, 203; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482. Hence, the only asserted basis upon which appellants rest their major premise disappears.

U. S. v. *N. Y. Central R. R.*, 263 U. S. 603, cited by appellants, is fundamentally different from the case at bar. The order there annulled was not predicated upon any finding that the standard passenger rates were unreasonable. Whether they

were unreasonable was not even considered by the Commission. Nor did its finding that the reduced rates were "just and reasonable for this class of travel" rest upon a finding or conclusion from evidence, but wholly upon its understanding that by the amendment Congress directed that "carriers shall be required to sell such a ticket at something less than the standard fare" (77 I. C. C. 200, 209), irrespective of the reasonableness of the standard fare; whereas, the amendment directed merely that the Commission should require carriers to issue interchangeable mileage or scrip coupon tickets "at just and reasonable rates."

In the case at bar the Commission made a finding of fact from the evidence that the assailed rates were unreasonable, and from that evidence found that the rates prescribed were reasonable. It construed the Resolution as granting no authority for reducing any rate without a finding of unreasonableness based upon evidence.

The commission does not interpret the resolution as impliedly repealing section 15a of the interstate commerce act

Concerning appellants' contention that the Commission, pursuant to the Resolution, has reduced a "reasonable" rate, which reduction will decrease their revenues $2,700,000 a year, thus in effect repealing section 15a:

We have previously pointed out the unsoundness of the argument that the reduced rate was "reasonable."

The claim of a $2,700,000 decrease in revenues completely ignores the fact that the minimum on grapes in connection with the reduced rate is increased from 26,000 to 30,000 pounds. Appellants figure the decrease in revenue as follows: The prescribed rate, $1.60, is 7½% less than the old rate of $1.73. The aggregate gross revenue in 1926 from this fruit traffic was $36,000,000; 7½% of that sum is $2,700,000. But the increase in the minimum on grapes to 30,000 pounds can not properly be ignored. If it is taken into consideration when applying the prescribed basis of rates to the 1926 traffic, the result is that the gross revenue for that year is reduced only 4.57%, or $1,764,335. Further reference to the importance of the increase in the minimum will be made *infra*, under the section dealing with alleged confiscation.

Reducing an unreasonable rate does not impliedly repeal section 15a, for that section itself (proviso to par. 2 and par. 17) reserves to the Commission the power to reduce unreasonable rates. (*Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 483.)

The Commission's report in *Revenues in Western District*, 113 I. C. C. 3, is a sufficient answer to the suggestion that the Commission interprets the Resolution as repealing section 15a. It said (p. 11):

> Both section 15a and the resolution must be given a construction which makes them practicable and workable,

citing *New England Divisions Case,* 261 U. S. 184, 197.

> Congress could not have intended to repeal or suspend by indirection so important a provision of law as section 15a. (*Ibid.*, 12.)

The rate reductions prescribed by the commission will not seriously affect the carriers' revenues

Even if it be assumed that the reduced rates will lower the carriers' gross revenues $1,764,335 a year, nevertheless this reduction will not affect the revenues of any of them seriously or substantially. The order is directed to 450 railroads and if the loss were equally divided among them, it would amount to $3,921 each. But of course the same amount of the traffic does not pass over each of these 450 lines. Most of it moves over 10 principal trunk lines. If the loss were equally divided among these 10 only it would amount to $17,643 a year each, a wholly inconsequential sum. The following table shows the net railway operating income of the 10 lines above referred to for 1926 (R. 50):

	Income, 1926
Southern Pacific	$48,128,841
Santa Fe	55,493,700
Western Pacific	4,337,205
Union Pacific	27,852,065
North Western	22,295,139
Milwaukee	18,394,933
Pennsylvania	106,432,758
New York Central	72,131,053
Erie	18,052,723
Baltimore & Ohio	50,805,337
	423,923,745

When $1,764,335 is deducted from the aggregate net operating incomes of these 10 lines, that aggregate is reduced from $423,923,745 to $422,159,410, a reduction of .42 per cent.

This would have been the reduction if the prescribed basis had been in effect in 1926. But, as indicated later in this brief, it is probable that in the future there will be no decrease at all in the *net* revenues, despite the rate reduction, because of clearly anticipated increase in the volume of this fruit traffic and an increase in the car loading resulting from the raise in the minimum weight on grapes.

Contention that the commission construed the resolution as authorizing it to fix a rate yielding revenue only "slightly above operating expenses" is unfounded

Appellants contend that "the Commission misconstrued the Resolution in that it held that a rate which yielded the carrier an amount slightly above operating expenses was a lawful rate."

The Commission made no such holding. The expression "slightly above operating expenses," used so often in appellants' brief, is quoted from the following language in the Commission's report on further consideration, 132 I. C. C. 582, referring to a cost study submitted by the carriers:

> In other words, even if the cost study were accepted without question, it would indicate that the prescribed rates are slightly above the operating expenses and would confirm the impression obtained from compari-

> sons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers. But we have not accepted the cost study * * *. (R. 67.)

It is at once apparent that this language had no reference whatever to the Resolution.

The views of the Commission upon the question of what rates it may lawfully prescribe are indicated in its principal report. It there quoted from its report in *Grain and Grain Products,* 122 I. C. C. 235, 264, as follows:

> Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. (R. 26.)

It also quoted from its report in *American Livestock Asso.* v. *A., T. & S. F.,* 122 I. C. C. 609, 617, in which it said:

> Rates that we may lawfully require must in principle be high enough to cover all the cost that may be fairly allocated to the service plus at least some margin of profit. * * * We say "in principle" because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by comparison with other rates. Of course, the other sections of the interstate commerce act must also be borne in mind in determining the lowest lawful rates in a particular situation.

The Commission cited as supporting authorities *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585, and *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605. In the *North Dakota Case* the Court said:

> The legislature undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business.

In the *West Virginia Case,* similar language was used:

> It was recognized [in the *North Dakota* Case] that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of service.

We think the above quotations make it clear that the Commission was fully aware that neither under the Hoch-Smith Resolution or otherwise could it prescribe a confiscatory rate. There was no interpretation of the Hoch-Smith Resolution as authorizing or requiring rates to be fixed "slightly above operating expenses." Nor did the Commission interpret the Resolution as calling for the prescription of rates only slightly above the point of confis-

cation. Its interpretation was that the rates it prescribed in pursuance of the Resolution had to be "compatible with the maintenance of adequate transportation service."

The report shows that the commission exercised only its statutory power to regulate rates; it did not attempt to regulate the fruit industry

By the first paragraph of the Resolution the Commission is directed, in adjusting freight rates, to consider the conditions which at any given time prevail in our several industries, in so far as it is legally possible to do so, to the end that commodities may freely move.

In the case at bar the Commission gave consideration to the conditions which prevailed in the deciduous fruit industry to the extent that such conditions might have a bearing on the question of the reasonableness of the rates.

All freight classification, to a more or less extent, rests upon commercial conditions; in fact, freight rates can hardly be considered at all without a concurrent consideration of commercial conditions. Included under the head of commercial conditions are at least two important elements of rate-making, viz, (1) the value of the article transported and (2) the value of the service to the shipper. These two elements are related, in that the greater the value of the article the greater the value of the service.

The value of the service to the shipper has always been a factor in determining the justness and rea-

sonableness of freight rates; that factor goes deep into the question of commercial conditions, involving the welfare of the carriers, the shippers, and the public. In one of the earliest cases decided by the Commission, *Imperial Coal Co.* v. *P. & L. E. R. R. Co.*, 2 I. C. C. 618, 636, it was held that:

> The value of the service is generally regarded as the most important factor in fixing rates. It furnishes theoretically, at least, a foundation for an equitable apportionment that takes into account all interests, those of the carriers, the owners of the property carried, and the public, as well as the dissimilarities of merchandise. * * * The value of the service to a shipper in a general sense is the ability to reach a market and make his commodity a subject of commerce.

And in a later case, *Coke Producers' Asso.* v. *B. & O. R. R. Co.*, 27 I. C. C. 125, 132, it was said that—

> Consideration must be given to the value of the service. If some commodities and the industries that use them can well stand rates that yield liberal profit to the carrier it can afford to transport at low rates other commodities that could not move except under low rates, and so the commerce and welfare of the country is promoted, as it must be, by the widest possible general diffusion and exchange of the products of the mine, the forest, the farm, the mill, the furnace, and the factory.

Mr. Commissioner Lane, in *"Investigation and Suspension Docket 26,"* 22 I. C. C. 604, 623–624, has contributed the following able exposition of the question of the "value of the service":

> * * * In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds. And this is the true meaning of the phrase "what the traffic will bear." It expresses the consideration that must be shown by the traffic manager to the need of the people for certain commodities. He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value, and that those in the community who can afford to purchase such articles can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities of common use. In this sense what the traffic will bear and the value of the service are analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon oriental rugs that it imposed upon cotton. This would not be undue discrimination as between commodities, even though it costs no more to transport the rugs than

it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with the other, and one may reasonably bear a higher rate than the other upon public grounds. It must be, therefore, that this Commission, under the amendment to section 1 passed by Congress in 1910, giving to us the control of freight classification, has power to determine the reasonableness of the differences that are made between the rates made applicable to the various kinds of commodities transported. We may not say that a rate shall be fixed so as to meet the requirements or needs of any body of shippers in their efforts to reach a given market, * * *. Neither could we fix an entire schedule of rates which would yield an inadequate return upon the fair value of the property used in the service given. There is, however, a zone within which we may properly exercise "the flexible limit of judgment which belongs to the power to fix rates." * * * There is no flexible limit of judgment if all rates must be upon a level of cost, and out of every dollar paid to the carrier must come a fixed amount of return for capital invested. The recognition of such a doctrine has never been suggested either by Congress or the Supreme Court. A just and reasonable rate must be one which respects alike the carriers' deserts and the character of the traffic. It can not be a rate that takes from the carrier a profit and thus favors the shipper at the carrier's expense, nor is it one which compels the shipper to

> yield for the transportation given a sum disproportionate either to the service given by the carrier or to the service rendered to the shipper. The words "just and reasonable" imply the application of good judgment and fairness, of common sense and a sense of justice to a given condition of facts. They are not fixed, unalterable, mathematical terms. Their meaning implies the exercise of judgment, and against the improper exercise of that judgment the Constitution gives protection, at least as far as the carriers are concerned.

It has always been recognized that rates depend largely upon the value of the commodity shipped. Obviously, "commercial conditions" control the value or price of an article. The Commission has recognized that an increase or a decrease in the value of the commodity transported is a circumstance which should be considered in determining the reasonableness of a rate. It will be remembered that in the case at bar it was shown that the value of the deciduous fruits in 1926 had receded to the point where they were less than 57% of the peak prices received in 1920, and that the 1926 prices were but 3.5% higher than the 1917 prices. In *Advances in Rates—Western Case,* 20 I. C. C. 307, 355, the Commission said:

> To be sure we can never depart from the *ad valorem* principle in the making of rates. No governmental railway system does. The national highways may as properly tax a

carload of tea with some relation to its value as the state may tax an import on the same basis, or the toll road distinguish between the automobile and the wheelbarrow. In all charges of an arbitrary character where public policy is involved, there is need that the greater burden shall fall upon those best able to support it. But classification of freight cares for value in the greater part.

In the same case on the same page the Commission said:

> In a land as intimately bound together in commerce as is this, where each city, village, and farm depends to large degree upon the resources of a nation for its supplies, there must arise questions of public welfare in the charges that the highways of the public may make altogether aside from questions of discrimination. It concerns us that we shall have the advantages of our varied resources; that New York and Chicago shall be made accessible to the fruit of Florida and California; that Minneapolis and Buffalo shall serve the thickly populated eastern states with their flour; that the wide plains of Texas and Wyoming shall be brought as near as possible to the cattle-consuming centers; that coal and lumber shall go where fuel and trees are scarce; and that, in short, our products and our people may be as mobile and as fluent as conditions may permit. Therefore, it may not answer public needs to always measure rates by any fixed standard, but the deviations from standard should be made

> primarily with an eye to public advantage * * *.

It seems to us that in any intelligent regulation of rates for the movement of the commerce of this country "commercial conditions" must necessarily be considered, not for the purpose of regulating the industry but for the purpose of regulating the rates. As stated in the *Import Rate Case* (*Tex. & Pac. Ry. Co.* v. *I. C. C.*), 162 U. S. 197, 219:

> Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation, or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

Appellants cite the *Willamette Valley Case* (*Southern Pacific Co.* v. *Int. Com. Comm.*), 219 U. S. 433. The differentiating feature of that case is that, as shown by page 447 of the Court's opinion,

no evidence whatever bearing upon the issue as to the reasonableness of the rate there in question was introduced.

The *Union Pacific Case* (*Int. Com. Comm.* v. *Union Pacific R. R.*), 222 U. S. 541, is in point. In that case much testimony was introduced before the Commission relating to the lumber industry. The Commission's order was attacked on the ground that the Commission was influenced solely by a consideration of the effect of the advance in rates on the lumber industry; "there were mutual criminations and recriminations of prosperity—the lumber men insisting that the railroads had made large profits under the old rate and did not need the advance, which would destroy the ability of the lumber men to ship lumber to the east." The court held that while there was language in the Commission's opinion which, looked at alone, might suggest that the Commission was attempting to decide more than the single question as to what was a reasonable rate, yet, taking the opinion as a whole, it affirmatively appeared that the Commission confined itself to the exercise of its statutory power to fix rates. We submit that this is true in the case at bar.

III

THE PRESCRIBED RATES WERE NOT SHOWN TO BE CONFISCATORY; ON THE CONTRARY, THE EVIDENCE INDICATES THEY WILL YIELD A SUBSTANTIAL PROFIT

Appellants contend the prescribed rates will produce an average revenue of $467.07 per car, that

the cost of transporting the fruit will be $470.06 per car, and therefore the prescribed rates will cause a loss of $2.99 per car.

The revenue per car is computed by applying the prescribed rate of $1.60 to the average weight per car in 1926 of all deciduous fruits except grapes, and, as to grapes, to a weight of 30,000 pounds, the minimum on grapes applying in connection with the prescribed rate. If in the future grapes are loaded to exactly the minimum of 30,000 pounds and the average weight of the other deciduous fruits remains the same as in 1926, the average load will be 29,192 pounds. This figure multiplied by the prescribed rate of $1.60 per 100 pounds equals $467.07, the estimated per car revenue suggested by the appellants.

The cost of the service is predicated upon a cost study, the results of which (a single sheet) were introduced in evidence before the Commission, Conrad's Exhibit No. 252. This exhibit purported to show the per car cost in September, 1923, of transporting *grapes* from California to Chicago over the Santa Fe. This cost, as shown therein, is $350.23. Appellants admit that two items totaling $9 per car were improperly included in that sum. When this $9 is deducted the figure $350.23 becomes $341.23. Dividing the latter sum by 2,331, the average mileage from the California shipping points to Chicago, a cost per car-mile of 14.64 cents is obtained.

Appellants assume that the cost per car-mile is the same east of Chicago as west thereof; and, therefore, in order to obtain the cost for the weighted average haul, 2,970 miles, the car-mile cost of 14.64 cents as indicated for the service west of Chicago is used for the whole distance, resulting in a cost of $434.81 (2,970 multiplied by 14.64 cents). Included in this cost is an amount representing the cost of the westbound movement of the empty cars, based on a ratio of 68.78 to the loaded movement. Appellants admit this ratio is erroneous, and when it is reduced to 67.58, said to be the correct ratio, the figure $434.81 becomes $433.68. (See p. 171 of appellants' brief, which refers to appellants' petition to the court below as authority for this last-mentioned figure.) The sum of $36.38 representing taxes (8.39% of $433.68) is added to the figure $433.68, resulting in $470.06 per car, the amount alleged by appellants as the total cost of the service.

This cost study signally fails to prove the cost of transporting the deciduous fruit traffic, as hereinafter demonstrated. But it may safely be assumed that the carriers have figured in all the known costs, and that the estimates are liberal; and we wish now to use it as a basis of indicating that the prescribed rates, instead of being confiscatory, will yield a substantial profit.

It is indisputable that the study purports to cover the cost of transporting only *grapes*. Appel-

lants have compared the cost of transporting grapes with the average revenue on all deciduous fruits. This brings improper results because grapes load more heavily than the other deciduous fruit. When the full costs assigned by appellants on *grapes* are set against the revenue on *grapes* under the prescribed rate of $1.60[4] it is shown that the prescribed rates yield a substantial profit.

The carload minimum weight on grapes applying in connection with the prescribed $1.60 rate is 30,000 pounds. Consequently the carriers will receive, in all instances, revenue on a weight of 30,000 pounds even though a less weight is loaded into the car, with the result that the per car revenue will never be less than $480.00 per car. This is $9.94 higher than the full cost of $470.06 alleged by appellants.

But since the minimum weight is 30,000 pounds, it is practically certain that the average weight will be over 30,000 pounds, especially since, for the purpose of calculating this average, actual weights lower than the minimum will be treated as the minimum—the revenue basis. If the average weight is only 31,000 pounds, the per car revenue will be $496, or $25.94 per car higher than the full cost of $470.06 alleged by appellants. The average weight of grapes shipped during the entire year 1922 was

[4] No attempt was made by the carriers to show the costs of Group J, to which the rate prescribed is $1.50, because of the negligible volume of traffic to that group.

32,940 pounds. (See report in earlier case, 100 I. C. C. 79, 83.) At the rate of $1.60 the per car revenue at that weight is $527.04 per car, which is $56.98 per car higher than the appellants' full assigned cost.

The appellants alleged cost of transporting grapes was admittedly the 1923 costs. The conclusion to be drawn from the evidence is unescapable that the costs in 1926 were substantially lower, for two reasons: (1) There was a much larger volume of the fruit traffic in 1926 than in 1923; 69,777 cars in 1923, as against 78,803 cars in 1926 (R. 223); and the appellants estimate that in 1927, 89,835 cars moved (appellants' brief, p. 9), while a witness for the complainant testified that if the barrier of transportation charges can be lowered and other costs reduced in some measure, the volume of the movement would increase by the year 1930 to 100,000 carloads. (R. 224.) Cost of service does not increase proportionately with an increase in the volume of traffic. "It is recognized by all authorities that the cost per unit of freight decreases with the volume." *L. & N. R. R. Coal Rates,* 26 I. C. C. 20, 31. This principle has often been remarked by this Court (*Brush Elec. Co.* v. *Galveston,* 262 U. S. 443)—

> An actual test of these rates may bring a larger return, by bringing about an increase of business.

Compare *Wilcox* v. *Cons. Gas Co.,* 212 U. S. 19, 51.

(2) Operating costs on the Santa Fe were lower in 1926 than in 1923. As stated in the Commission's report on further consideration, "it is at least doubtful whether the more economical operations in 1926 would not have affected the expense apportioned to the fruit traffic. In 1926 the operating ratio of the Santa Fe was 65.15, as compared with 72.51 in 1923," a drop of over 10 per cent.

If, in view of the increase in the volume of the traffic and the economies effected in operation, the cost of the service was lowered only 10 per cent (a very moderate estimate) the operating cost of $433.68 alleged by appellants would become $390.31 and the total, including taxes, of $470.06 would become $426.29, and this would result in a profit of $53.31 per car from the guaranteed revenue of $480 per car on grapes; a profit of $69.31 if the average weight of grapes is 31,000 pounds with revenue of $496 a car, and a profit of $100.35 per car if the average weight is 32,940 pounds, as it was in 1922, with revenue of $527.04 per car. Of course, these amounts would necessarily be somewhat lower in view of the added cost of transporting the additional weight.

It is also stated in the last-mentioned report that "the $433.68 referred to above as the corrected expense per car [before taxes were added] for a distance of 2,970 miles is based on a car-mile cost found for a haul of 2,331 miles, including handling on the expensive originating division with cost of

35.85 cents a car-mile," which as shown was virtually three times higher than on any other division of the Santa Fe. (R. 482.) "If the mileage and cost of this division be set aside before computing the car-mile cost to be applied for the remainder of the 2,970-mile haul, the $433.68 would become $426.48 * * *."

Additional possible defects come to the Commission's attention:

> The cost per-mile of refrigerator repairs was computed upon the basis of 110 per cent of the average cost per car-mile of repairing all freight cars on the ground that "refrigerator freight cars cost about 110 per cent of the average cost to maintain freight cars." Apparently no consideration was given to the fact that with a difference in the average haul of the fruit traffic as compared with that of all traffic, the car-repair cost *per car-mile* for this traffic may be less than for all freight cars even though the cost *per car* is 10 per cent greater. We also note that 10 per cent was added for the expense of carrying company material. It is questionable whether so large an allowance for this purpose would be generally applicable. (R. 68.)

When these various matters are considered and allowed for it clearly appears that the cost study submitted by the carriers itself strongly indicates that the rates prescribed by the Commission, instead of being less than the cost of the service, will yield the carriers a substantial profit.

The increase in the minimum weight on grapes from 26,000 to 30,000 pounds has an important bearing when revenues are considered. Grapes constitute about 80% of this fruit tonnage. Under the $1.73 rate, minimum 26,000 pounds, the minimum per car revenue was $449.80, whereas under the reduced rate of $1.60, minimum 30,000 pounds, the lowest possible per-car revenue is $480, which is $30.20 *higher* than under the old basis.

In the well-known *Lemon Case, Arlington Heights Fruit Exchange* v. *Southern Pac. Co.*, 22 I. C. C. 149, in which the Commission reduced the transcontinental rate on lemons from $1.15 to $1.00, and at the same time increased the minimum from 26,200 pounds to 34,000, its order being upheld by the Commerce Court and by this court, 203 Fed. 56, and 231 U. S. 736, the Commission said:

> There can be little doubt from a purely transportation standpoint, having reference mainly to the cost of the service, a $1.00 rate with a minimum of 34,000 pounds, is better business than a minimum of 26,200 pounds at a rate of $1.15.

As shown by past experience, an increase in the minimum results in a higher average loading. The higher average loading will lower the cost of the carriage and result in greater net returns, for, as stated by the Commission in *Transportation of Wool, etc.*, 23 I. C. C. 151, 167, it is axiomatic that the cost of the carriage is decreased in proportion

as the car-loading can be increased. In the last-quoted case, the Commission further said:

> * * * In these days, and especially in case of these transcontinental lines, where the limit of their present facilities has been reached, where double tracks are being provided because single tracks are no longer sufficient, where additional cars and engines are continually being called for, it certainly is in the interest of both railroad and shipper to secure the heaviest possible loading and thereby the most economical movement of this and every other commodity.

The carriers' cost study can not be accepted for the following reasons:

(*a*) It purported to show the cost of transporting grapes only, and did not purport to show the cost of transporting any of the other deciduous fruits.

(*b*) It did not purport to show the cost of the service on each of the numerous railroads which handled the business, but only on one railroad, the Santa Fe.

(*c*) It covered shipments moving in one month only—September, 1923, which was over six years ago.

(*d*) There was nothing to show that the present costs on the Santa Fe are the same, or approximately the same, as they were on the Santa Fe in that one month.

(*e*) There is nothing to show that the costs on the other lines in September, 1923, were the same, or approximately the same, as they were on the Santa Fe at that time.

(*f*) The cost study consisted for the most part merely of estimates of the carrier's employees. It was admitted before the Commission that but small part of the costs were directly assigned, i. e., $55.92 out of $470.06 per car, and that all of the balance were "unallocatable expenses." (R. 476.)

(*g*) The exhibit introduced in evidence before the Commission incorporated only the bare result of the cost study, that is, gave only the final figures, and was not supported by any details, so that it was impossible to check even the mechanical or clerical accuracy of the results. The exhibit as submitted to the Commission consisted essentially of nothing more than an assertion that the costs were so much per car.

The carrier's weak attempt to show the cost of this service is an admission of the well-known fact that it is impossible to ascertain the cost of transporting a single commodity. In *Cattle Raisers' Asso.* v. *M. K. & T. Ry. Co.*, 11 I. C. C. 296, 335, it was said:

> It has often been said in this and in other cases by traffic officials that it is impossible to determine the cost of moving a particular kind of freight.

In *I. C. C.* v. *Union Pacific R. R.*, 222 U. S. 541, there was no appeal from the Master's finding that:

> The carriers concede that they are unable to determine the cost of this traffic, in and of itself, and that they are unable to say, with any satisfactory accuracy whether or not they make a profit upon it; * * *.

In *A. T. & S. F. Ry. Co.* v. *United States*, 203 Fed. 56, affirmed 231 U. S. 736 (known as the *Lemon case*), the Commerce Court said:

> That the Commission, in reaching this conclusion, [that the $1.00 rate on lemons from California to eastern points was very considerably in excess of the mere out-of-pocket expense, but, based upon the evidence before it, it even exceeded that part of the entire operating costs fairly to be apportioned to this particular traffic, and thus, contributed, to some extent, the payment of interest charges and dividends] failed to follow the expert evidence offered by the railroads in the matter of proportionate operating cost would not justify this court in annulling the order, especially *as it is concededly impossible to determine with accuracy the fair proportionate cost of transporting any single kind of merchandise.* (Italics ours.)

Appellants made no effort to show that the prescribed rates would result in a loss when applied to the entire deciduous fruit traffic. Such a showing is insufficient to support a claim of confiscation. There must be a showing in respect of the entire

traffic to which the rate applies. *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585, 604.

The appellants have totally failed to meet the burden cast upon them by the law of proving that the prescribed rates are confiscatory.

CONCLUSION

The decree of the lower court denying the prayer for injunction and dismissing the bill for want of equity should be affirmed.

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